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**IN THE
COURT OF APPEALS OF INDIANA**

DAMON A. COLLINS,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 20A05-0610-CR-552

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable James W. Rieckhoff, Judge
Cause No. 20D05-0502-FD-56

March 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Damon A. Collins (“Collins”) appeals his conviction for Theft, a Class D felony,¹ enhanced because of his status as a Habitual Offender.² We affirm.

Issue

Collins raises the sole issue of whether the admission of certain evidence violated his Sixth Amendment right to confront a witness.

Facts and Procedural History

At 12:45 a.m. on February 14, 2005, Goshen Police Officer Robert Warstler (“Officer Warstler”) pulled over a car, because the temporary license plate was not visible in the rear window. Heidi Anderson (“Anderson”) was driving the car, and Collins and Valrae Mezaros (“Mezaros”) were passengers. Officer Warstler ran a computer check on each person and determined that Collins had an outstanding arrest warrant from Blackford County.

After placing Collins under arrest, Officer Warstler searched the front passenger area of the vehicle where Collins had been sitting and discovered the glove compartment was “loaded down with coins.” Trial Transcript at 65. When Officer Warstler questioned Anderson and Mezaros, they both indicated that Collins had been robbing vending machines.

Anderson and Mezaros took Officer Warstler to the Chalet Party Shop and directed him to look on top of a pop machine. The empty coin box from the machine was where the girls had indicated. Because there was no indication that the machine had been opened by force, Officer Warstler questioned Anderson and Mezaros as to whether Collins had a set of

¹ Ind. Code § 35-43-4-2.

vending machine keys. Anderson said that Collins did, but she did not know where they were. Based on this information, Officer Warstler returned to the car and searched for the keys. The keys were found wrapped inside a taco from Taco Bell, sitting on the floorboard in front of the front passenger seat, where Collins had been sitting.

On February 15, 2005, the State charged Collins with Theft, a Class D felony, and alleged that he is a Habitual Offender. On the morning of the jury trial, Collins filed a Motion in Limine requesting the trial court to order the witnesses to refrain from referring to anything said or indicated by Mezaros, because she had died prior to trial and had not been deposed. The trial court granted the motion but limited the restriction to actual statements made by Mezaros. Thus, witnesses for the State could testify that Mezaros gave a statement to police, but could not address the content of the statement.

Officer Warstler testified he questioned both Anderson and Mezaros, “the driver and backseat passenger took [him]” to the Chalet Party Shop, and that Anderson stated to him that Collins stole the coins from the pop machine. Tr. at 68. The prosecutor also asked Officer Warstler: “At any time in your investigation did anybody tell you that anyone other than Mr. Collins was breaking into the pop machines?” Tr. at 73. Officer Warstler replied, “no.” Collins did not object to this question or to a similar question in reference to whether anyone other than Collins had possession of the keys.

The jury found Collins guilty of Theft, a Class D felony, and Collins pled guilty to being a Habitual Offender. On May 31, 2006, the trial court sentenced Collins to the Indiana Department of Correction for seven and one-half years. Collins now appeals.

² Ind. Code § 35-50-2-8.

Discussion and Decision

I. Standard of Review

Collins contends he was deprived of a fair trial by the prosecutor eliciting statements from Officer Warstler regarding statements made by Mezaros in violation of the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Because he did not object to the challenged testimony at trial, Collins couches his argument in terms of fundamental error.

A trial court has broad discretion in ruling on the admissibility of evidence. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). The failure to make a contemporaneous objection to the admission of evidence at trial results in waiver of the error on appeal. Jackson v. State, 735 N.E.2d 1146, 1152 (Ind. 2000). A defendant can seek to avoid the effects of such waiver by arguing the admission of evidence was fundamental error. When an argument is couched in this manner, we review the record for error that is a substantial, blatant violation of basic principles rendering the trial unfair and depriving the defendant of fundamental due process. Oldham v. State, 779 N.E.2d 1162, 1170 (Ind. Ct. App. 2002), trans. denied. However, any error caused by the admission of evidence is harmless error if the erroneously-admitted evidence was cumulative of other evidence properly admitted. Wilhelmus v. State, 824 N.E.2d 405, 414 (Ind. Ct. App. 2005).

II. Analysis

Collins asserts that the testimony of Officer Warstler regarding statements made by Mezaros rendered his trial unfair due to the blatant violation of his constitutional right to

confront witnesses testifying against him. Specifically, he challenges Officer Warstler's testimony during direct examination that "the driver and backseat passenger took [him]" to the Chalet Party Shop and his negative responses to the questions of whether he received information indicating that anyone other than Mr. Collins was breaking into the pop machines or had possession of the keys used to open the pop machines.

None of the challenged testimony includes an actual statement made by Mezaros. At best, it refers to her conduct during the police investigation. Even assuming the challenged testimony of Mezaros' conduct was erroneously admitted, it does not rise to the level of reversible error much less fundamental error due to other unchallenged evidence that was properly admitted at a later point in the trial. It is well settled that a defendant may open the door to questions otherwise inadmissible under the rules of evidence. Jackson v. State, 728 N.E.2d 147, 152 (Ind. Ct. App. 2006). The evidence relied upon to "open the door" must leave the trier of fact with a false or misleading impression of the facts related. Id.

In the cross-examination of Officer Warstler, the following exchange posed questions that led to testimony elicited about the actual substance of Mezaros' statement to police:

- Q No. Your information, all of it, came from Heidi, correct?
A And the back seat passenger [Mezaros].
Q Well the back seat passenger – she keeps coming up. She's deceased, correct?
A I don't know. That's what I got today.
Q Okay. And you had no corroboration about this evidence? Any independent corroboration?
A Other than what we got and her statement, no.

Tr. at 99. The first question posed attempts to portray the false impression that Anderson was the only source of information linking Collins to the theft. Based on these questions

posed on cross-examination, the trial court allowed the following on redirect:

Q I think my question was what did Ms. Mezaros say about Mr. Collins involvement?

A That he's the one that –

MS. HEAMON: Objection. Hearsay.

THE COURT: Overruled.

A He's the one that stole the coins.

Q Is that the same testimony that Ms. Anderson gave you?

A Yes, sir.

Q At the scene?

A Yes.

Q And then later on as you understand it, both ladies gave a written statement under oath?

A Correct.

Q And you were here when Ms. Anderson testified about her statement under oath?

A Yes, sir

Q And in your investigation of this case, was there anything inconsistent in either of their statements from the time they talked to you at the scene until the time that their written statements were taken?

A No.

Q So in fact there was other corroboration from your point of view that indicated Mr. Collins committed this crime?

A Yes. I was just under the impression I couldn't talk about the deceased.

Tr. at 112-13.

When considering the questions posed by Collins' defense counsel to Officer Warstler on cross-examination, it is apparent that Collins opened the door regarding Mezaros' statement corroborating the information provided to the police by Anderson, permitting the above questions posed on redirect. This also opened the door to the testimony of Detective Kyle Priem that statements were taken from Anderson and Mezaros and both statements were consistent in alleging that Collins was using keys to remove money from pop machines. In light of this properly admitted testimony, the challenged portion of Officer Warstler's

testimony is cumulative of this other evidence presented at trial, making the admission of the challenged testimony harmless. Accordingly, we find that Collins has failed to demonstrate fundamental error as to the challenged testimony, because the jury was presented with properly admitted evidence of Mezaros' statement in which she directly accused Collins of theft.

Affirmed.

VAIDIK, J., and BARNES, J., concur.